**MOTIONS FOR NEW TRIAL**
**Rule 24.1 — New trial because of jury misconduct — Revised 11/2009**

Rule 24.1(c)(3), Ariz. R. Crim. P., states that the trial court may grant a new trial if a juror or jurors have been guilty of any of these six types of misconduct:

> (i) Receiving evidence not properly admitted during the trial or the aggravation or penalty hearing;
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> (ii) Deciding the verdict by lot;
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> (iii) Perjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination;
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> (iv) Receiving a bribe or pledging his or her vote in any other way;
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> (v) Becoming intoxicated during the course of the deliberations; or
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> (vi) Conversing before the verdict with any interested party about the outcome of the case.

The Comment to Rule 24.1 explains that these "six blatant forms" of juror misconduct may be grounds for a new trial under Rule 24.1(c)(3) and that the specification of these six types of misconduct "is intended to be construed to exclude all others." In *State v. Conn*, 137 Ariz. 152, 157, 669 P.2d 585, 590 (App. 1982), *remanded in part on other grounds*, 137 Ariz. 148, 669 P.2d 581 (1983), a juror violated the trial court's admonition by discussing a sexual assault case with a co-worker during the trial. The co-worker then discussed the case with a friend, an attorney whose girlfriend was a law clerk in defense counsel's office. The juror eventually learned from his conversations that defense counsel's law clerk had refused to work on the case because of its distasteful nature. Although the Court of Appeals found it unquestionable that "the juror was guilty of gross misconduct," his misconduct did not "come within any of the acts enumerated

in Rule 24.1(c)(3)." *Id*. Therefore, even this egregious misconduct was not grounds for a new trial.

Although juror misconduct may be grounds for a new trial, the trial court may not consider any evidence concerning the "subjective motives or mental processes" of the jury. *See* Rule 24.1(d); *State v. Hall*, 129 Ariz. 589, 595, 633 P.2d 398, 404 (1981); *State v. Callahan*, 119 Ariz. 217, 580 P.2d 355 (App. 1978). Rule 24.1(d) provides that when a defendant challenges a verdict under Rule 24.1(c)(3), the court may receive evidence concerning the conduct of a juror, court official, or third person. However, the trial court may not inquire as to "the subjective motives or mental processes which led a juror to assent or dissent from the verdict." [Emphasis added.]

For example, in *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996), the jury unanimously found the defendant guilty of theft and murder. On appeal, the defendant submitted an affidavit from the jury foreperson stating that "(1) the jury had considered defendant's plea negotiations and his failure to testify as evidence of his guilt; (2) the jury had reviewed the notes of an alternate juror; (3) a juror had fallen asleep; (4) a juror thought that defense counsel's failure to object to every exhibit might indicate that he thought his client was guilty; (5) a juror said defendant could appeal if he did not like the verdict; and (6) the foreperson felt that she was coerced into finding defendant guilty." *Id*. at 288, 908 P.2d at 1073. The Arizona Supreme Court found that these allegations did not justify relief because these allegations of misconduct "would require an inquiry into the subjective motives or mental processes of the jurors, which is prohibited by rule 24.1(d), Arizona Rules of Criminal Procedure." *Id.*

In *State v. Walker*, 181 Ariz. 475, 891 P.2d 942 (App. 1995), the defendant was convicted of transporting marijuana for sale. At trial, an airline ticket with a baggage receipt stapled to it was admitted in evidence, although an officer testified that the receipt was not stapled to the ticket when the officer took the papers into evidence. The defendant contended that addition of this receipt tended to connect him to the marijuana-laden suitcase and contradicted his testimony that he only traveled with small carry-on bags. After the verdict, the defendant moved for a new trial and submitted an affidavit from a juror stating that the stapled receipt had influenced her verdict. *Id*. at 483, 891 P.2d at 950. The Court of Appeals held, "The trial judge correctly ruled that the affidavit was inadmissible on the ground that it inquired into the 'subjective motives or mental processes' that led to the juror's verdict," citing Rule 24.1(d), Ariz. R. Crim. P. *Id*.

The trial court may grant a new trial if the jury considers "evidence not properly admitted at trial," also known as "extrinsic evidence." *See* Rule 24(c)(3)(i). "Extrinsic evidence" is information, whether admissible at trial or not, that was not admitted at trial. *State v. Dickens*, 187 Ariz. 1, 15-16, 926 P.2d 468, 482-83 (1996), citing *State v. McLoughlin*, 133 Ariz. 458, 460-61, 652 P.2d 531, 533-34 (1982). Under Rule 24.1(c)(3)(i), "[If] a jury has considered extrinsic evidence, the trial court must grant a new trial unless it finds beyond a reasonable doubt that such evidence did not affect the verdict." *State v. Schackart*, 175 Ariz. 494, 502-03, 858 P.2d 639, 647-48 (1993), citing *State v. Chaney*, 141 Ariz. 295, 311, 686 P.2d 1265, 1281 (1984). In *Schackart*, a juror had a copy of a newspaper that contained an article about the defendant. The judge questioned the juror and she denied having read the article or any other account of the trial. The defendant argued that the trial court should have granted his motion for a new

trial based on juror misconduct. The Arizona Supreme Court found no error, noting that the defendant had failed to show any misconduct.[1]

In *State v. Glover*, 159 Ariz. 291, 767 P.2d 12 (1988), the Arizona Supreme Court found that the jurors had committed misconduct justifying a new trial by considering extrinsic evidence in their deliberations. In *Glover*, the defendant drank alcohol and used prescription drugs before firing his gun at the victim. The defendant claimed it was an accident, saying that he was so intoxicated that he fell down and the gun went off accidentally. During deliberations, one of the jurors asked his wife, who had medical training, what effect the drugs and alcohol would have had on the defendant; she replied that the defendant could not have ingested that much alcohol and drugs or he would have been dead. *Id*. at 292-93, 767 P.2d at 13-14. In addition, when the jury had not yet reached a verdict and appeared to be deadlocked, one of the jurors asked someone in law enforcement what the effect of a hung jury would be; she was told that the defendant would not be retried and would go free. After the guilty verdict, the defendant filed a motion for new trial supporting it with an affidavit from the foreman of the jury setting forth these two claims of jury misconduct. The Arizona Supreme Court held that the jurors' misconduct justified a new trial because their receipt of extraneous evidence "denied the defendant any ability to cross-examine, confront or explain the matter," and the court could not "conclude that the extraneous information did not contribute to the verdict." *Id*. at 294, 767 P.2d at 15.

[1] *See also State v. Davolt*, 207 Ariz. 191, 207-08, 84 P.3d 456, 472-73 (2004) (Defendant failed to prove the jury had received or considered extrinsic evidence as he proffered no evidence that "the newspapers allegedly read or carried by the jurors contained articles concerning the trial. . . ").

In addition, Rule 24.1(c)(3)(i) is violated when a juror uses a reference work to obtain information during trial. In *State v. Cornell*, 173 Ariz. 599, 600, 845 P.2d 1094, 1095 (App. 1992), when the jury went home one evening during deliberations, one juror consulted a dictionary for the definitions of "aggravate" and "assault." The juror said he made up his mind to vote guilty based on the dictionary definitions. *Id*. at 601, 845 P.2d at 1096. Because the dictionary definitions used by the juror during deliberations were neither admitted into evidence at trial nor included in the trial court's instructions to the jury, they were extraneous evidence. The Court of Appeals could not say beyond a reasonable doubt that the dictionary use did not affect the verdict, so that Court reversed the defendant**'**s conviction and remanded the case for a new trial. Cf. *State v. Poland*, 132 Ariz. 269, 282-83, 645 P.2d 784, 797-98 (1982) [juror looked up a name and address in a telephone book; while this was improper, Court found beyond a reasonable doubt that it did not affect the verdict]; *State v. Holden*, 88 Ariz. 43, 51, 352 P.2d 705, 710-11 (1960) [juror's reference to California treatise on jury instructions did not prejudice defendant]; *United States v. Steele*, 785 F.2d 743, 748-49 (9th Cir. 1986) [several jurors' unauthorized use of dictionary did not affect the verdict because the definitions examined were not defined by the court or used in the instructions].

Note that the rule against considering extrinsic evidence applies even when the jurors have considered extrinsic evidence by accident. In *State v. Meehan*, 139 Ariz. 20, 22, 676 P.2d 654, 656 (App. 1983), the coat the defendant was wearing when he was arrested was admitted in evidence and the jurors took the coat to the jury room during deliberations. The jurors then discovered marijuana in the coat**,** which had not been admitted into evidence**,** and discussed it during deliberations. The Court of Appeals

found that the trial court did not abuse its discretion in ordering a new trial because the trial court could not conclude beyond a reasonable doubt that this fact did not contribute to the verdict. *Id*.

What occurs at trial cannot be "extrinsic evidence." In *State v. Adams*, 145 Ariz. 566, 572, 703 P.2d 510, 516 (App. 1985), the defendant supported his motion for new trial with affidavits stating that child witnesses received "hand and head signals" from adults in the courtroom and that the children responded to the signals by giving yes or no answers. The defendant claimed that the jurors were guilty of misconduct by receiving evidence not properly admitted during the trial. The Court of Appeals said, "This is a patently absurd argument. The jurors were not guilty of any misconduct. They did not receive any evidence within the meaning of the rule." *Id*. The Court reasoned that the situation was no different than if the defense attorney had made a face or sneered to indicate his displeasure at an answer. *Id*.

Also note that jurors are expected to use their own experience and knowledge during deliberations, and there is nothing improper in their doing so. This is not "extrinsic evidence" because it does not come from a source outside the jurors or the court. In *State v. Leonard*, 151 Ariz. 1, 725 P.2d 493 (App. 1986), a DUI case, one of the jurors told the jury that he was a former alcoholic, related stories of his drinking and driving, and said the defendant would lose his job if he were convicted. *Id*. at 5, 725 P.2d at 497. The defendant submitted juror affidavits to this effect to support his motion for new trial. The Court of Appeals found no error, noting that there was no evidence suggesting that the jury received any information from outside sources.

Rule 24.1(c)(3)(iii) provides that a juror commits misconduct if the juror perjures himself or "willfully" fails to answer voir dire questions fully. In *State v. James*, 175 Ariz. 478, 857 P.2d 1332 (App. 1993), the defendant moved for a new trial based on juror misconduct. He submitted an affidavit from the jury foreman stating that the jury had held the defendant's failure to testify against him and had applied the wrong standard of proof. The defendant further claimed, "the foreman perjured herself by swearing to follow the court's instructions, including returning a verdict of not guilty unless the state proved guilt beyond a reasonable doubt, and then convicting on a lesser standard." *Id*. at 478-79, 857 P.2d at 1332-33. The Court of Appeals rejected these arguments, noting that all three claims concerned the jurors' mental processes. The Court also noted that the defendant's third claim did not constitute perjury, first, because the Rule expressly covers only perjury during voir dire, and second, because the jury empanelment oath does not require a "sworn statement" within the meaning of the perjury statutes. The Court concluded, "[W]hile we cannot condone the alleged conduct in question here, it does not constitute perjury and the trial court did not err in denying the motion for new trial on this ground." *Id*. at 479, 857 P.2d at 1333.

Although jurors must answer *voir dire* questions honestly under this Rule, they do not have to volunteer information when they are not asked questions about a particular subject. In *State v. Cummings*, 148 Ariz. 588, 716 P.2d 45 (App. 1985), a child molestation case, two of the jurors mentioned during deliberations that they had been molested as children. The defense argued that the jurors had committed misconduct because they had failed to reveal that fact during voir dire. The Court of Appeals found no misconduct because the jurors were never specifically asked whether or not they

had been victims of child molestation. *Id*. at 592, 716 P.2d at 49. Accord, *State v. Adams*, 145 Ariz. 566, 573, 703 P.2d 510, 517 (App. 1985).

Under Rule 24.1(c)(3)(v), a new trial may be granted if a juror becomes intoxicated during deliberations. Note that this provision applies to claims of intoxication with drugs as well as alcohol. In *State v. Macumber*, 119 Ariz. 516, 523, 582 P.2d 162, 169 (1978), the defendant filed a motion for new trial alleging that one juror was intoxicated on heavy medication during the jury's deliberations. At least two of the jurors testified that the juror experienced mood changes and on occasion cried, but other jury members testified that she did not appear to be intoxicated. The juror's treating doctor testified as to what medication the juror was taking, the dosages, and the underlying medical problems. The juror herself denied any incapacity during the trial or the deliberations. On appeal, the Arizona Supreme Court found no error, stating that the record supported the trial court's conclusion that the juror was not intoxicated. *Id*.

Rule 24.1(c)(3)(vi) provides that a juror is guilty of misconduct if, before the verdict, the juror converses with "any interested party about the outcome of the case." A particularly egregious violation of this rule occurred in *State v. Adams*, 27 Ariz. App. 389, 555 P.2d 358 (App. 1976). In that case, during a recess in the trial, the defendant and a juror met on the street outside the courthouse. The defendant got into the juror's car and they drove to the defendant's house. The juror came into the defendant's house and met his family; the juror and the defendant then drank a beer together while discussing the defendant's case. After the jury found the defendant guilty, he filed a motion for new trial. He admitted that he did not tell his attorney about the meeting with the juror because the juror had promised him that he would induce the rest of the jurors

to return a not guilty verdict. *Id*. at 391, 555 P.2d at 360. Although the Court of Appeals said that "the juror's conduct was highly improper," the Court affirmed the defendant's conviction for three reasons. *Id*. First, the defendant was aware of the misconduct but did not raise it during trial; second, the defendant was himself at least partly responsible for the juror's misconduct[2]; and third, the defendant failed to show that any prejudice resulted from the misconduct.

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[2] Indeed, the defendant's conduct was a crime. *See* Arizona Revised Statutes § 13-2807, making it a class 6 felony to communicate with a juror "with intent to influence a juror's vote, opinion, decision or other action in a case . . . other than as part of the normal proceedings of the case."